1992

Steve Stucker and Michelle Stucker v. Summit County (Respondent), Highland Estates Homeowner's Association, Kathy Mears, Dave Rich, Elwayne Daly, and Sue Smith : Brief of Appellant

Utah Court of Appeals

Jody K. Burnett; Attorney for Respondent.
Robert Felton; Attorney for Appellants.

In the Utah Court of Appeals

STEVE STUCKER and MICHELLE STUCKER, Plaintiffs/Appellants, vs. SUMMIT COUNTY (RESPONDENT), HIGHLAND ESTATES HOMEOWNER'S ASSOCIATION, KATHY MEARS, DAVE RICH, ELWAYNE DALY, and SUE SMITH, Defendants.	Case No. 920263-CA Priority 16

BRIEF OF APPELLANTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH

The Honorable Homer F. Wilkinson presiding

* *

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I

TABLE OF CONTENTS

II

PARTIES TO THE PROCEEDINGS

1. Plaintiffs and Counsel

   A. Steve Stucker and Michelle Stucker, 235 East Starview Drive, Park City, Utah 84060, Plaintiffs.

   B. Robert Felton of 310 South Main Street, Salt Lake City, Utah 84101, attorney for Plaintiffs.

2. Defendant/Appellants

   A. Summit County

   B. Jody K. Burnett of 257 East 200 South, P.O. Box 45678, Salt Lake City, Utah 84145, attorney for Defendant/Respondents.

III

TABLE OF AUTHORITIES

1. **CASES**

2. **STATUTES**

3. **RULES**

4. **ORDINANCES**

A. Development Code of Summit County (1977 as amended 1981)

B. Snyderville Basin Development Code (1985)

IV
JURISDICTION

The Judgment which is the subject of this Appeal is a final, Summary Judgment of the Third Judicial District Court in and for Summit County, State of Utah (R p.288). The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code Annotated §78-2-2(3)(j) (1953 as amended 1989).

V
NATURE OF THE PROCEEDINGS

This is an appeal from a Summary Judgment of the District Court entering Summary Judgment and Dismissing Plaintiffs' Complaint as to all claims against Summit County dated December 16, 1991 (R p.289). The remaining Defendants in the case were dismissed by stipulation pursuant to an Order of Dismissal dated March 24, 1992 (R p.292). Notice of Appeal of Steve and Michelle Stucker as to the Order of Summary Judgment dismissing their complaint against the Defendant Respondent Summit County was filed April 3, 1992 (R p.294).

VI
STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the District Court err in granting Summary Judgment dismissing the provisions of Plaintiffs' cause of action that they had a vested right to utilize their property for a commercial use in conformance with current land use ordinances in effect in Summit County at the time they submitted their application for a building permit?

2. Is Summit County estopped from denying Plaintiffs a building permit?

3. Did the action of Summit County constitute an amendment to an existing subdivision without complying with state statutes?

4. Does the requirement that any landowner in the Snyderville Basin obtain a "consensus of compatibility" from neighbors prior to the issuance of any building permit make the consent or "consensus" of neighboring landowners an impermissible criterion for the issuance of said permit?

5. Was the absolute requirement of compatibility found in §5.6.3 of the Snyderville Basin Development Code (1985) applied to Plaintiffs in an arbitrary capricious and discriminatory fashion?

Standard of Review. This appeal from a Summary Judgment is reviewed for correctness giving no deference to the Trial Court's conclusion of law. The Appeals Court should construe the record in the light most favorable to the Appellants. Ron Case Roofing and Asphalt Paving, Inc., v. Blomquist, 773 P.2d. 1382, 1385 (Utah, 1989). Summary Judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); Rollins v. Peterson, 13 P.2d. 1156, 1158 (Utah, 1991). Because summary judgment is granted as a matter of law this Court is free to reappraise the Trial Court's legal conclusion. Hunt v. Hurst, 785 P.2d. 414, 415 (Utah, 1990).

VII

DETERMINATIVE LEGAL AUTHORITY

1. Development Code of Summit County (1977 as amended 1981) §1.1-6(49); §3.11; Chapter 12; Chapter 13 . . . (Exhibit A)

2. Snyderville Basin Development Code (1985) Statement of Intent re: §1.3; §4.1; Chapter 5 . . . Exhibit B

3. §57-5-7.1 Utah Code Annotated (1953 as amended) . . . Exhibit C

4. §57-5-8 Utah Code Annotated (1953 as amended) . . . Exhibit C

VIII
STATEMENT OF THE CASE

1. Nature of the Case. This is an appeal by the Plaintiffs who are the owners of a lot in Summit County from dismissal of their complaint to compel Summit County to issue a building permit for construction on their lot and entering summary judgment in favour of Summit County (R p.280, 288). The other named Defendants were never served but filed a Motion to Dismiss and entered their appearance in this case. The action was dismissed by stipulation as to those parties and no claims or issues as to these individual Defendants are asserted in this appeal.

Plaintiffs - Appellants contend that they had a vested right to obtain a building permit for commercial use on their lot; Summit County was estopped from denying the permit application and that the denial was arbitrary and capricious.

2. Course of Proceedings. This action was commenced November 29, 1990 and the Defendant, Summit County, was served. The other parties named in the Complaint filed a Motion to Dismiss on September 12, 1991 (R p.39) and the action was later dismissed by stipulation as to all of the parties except Summit County (R p. 289). On August 7, 1991, the Plaintiffs moved for summary judgment (R p. 51). Summit County also filed a Motion for Summary Judgment on September 16, 1991 (R p. 153) and filed a Memorandum in Opposition to the

Stuckers' Motion and in support of their Motion (R p. 155). The joint Motions for Summary Judgment were argued before the Court on October 15, 1991 (R p. 279).

3. Disposition at Trial Court. No trial was held in this matter. On August 30, 1991, the Trial Court issued a minute entry that said "Plaintiffs Motion for Summary Judgment is denied. Defendant's Motion for Summary Judgment is granted" (R p. 280). The Trial Court gave no basis or reasons for its ruling and the Order stated:

> "ORDERED, ADJUDGED and DECREED that Defendant, Summit County's Motion for Summary Judgment is hereby granted as to all claims made in Plaintiffs' Complaint as against Defendant, Summit County, and the Plaintiffs' Complaint as against Defendant, Summit County, is hereby dismissed, with prejudice and upon the merits, no cause of action.
>
> It is further ordered that Plaintiffs' Motion for Summary Judgment against Defendant, Summit County, is hereby denied" (R p. 289). (SEE Exhibits to Plaintiffs' Brief)

IX

FACTUAL BACKGROUND

1. Plaintiffs own Lot 225 of the Highland Estates Subdivision, Plat B, located in Summit County, Utah (R p.1). The lot is located in a subdivision which was filed in October, 1964 (R p.1). Summit County had no Master Plan nor zoning ordinance prior to 1977 (R p.2,33). The Restrictive Covenants of Highland Estates stated that lots 1-4, 20-25, 80-93 and 225-236 were "commercial lots" (R p.10). The zone change designating this lot as commercial occurred with the filing of the plat in 1964. With the filing of the plat, the roads were dedicated and became the County's property.

2. Summit County's first Master Plan was adopted in 1977 (R p.157). Summit County admits that lot 225 was designated as "commercial" at that time (R p.33) and retained that classification until 1985, when a new, land use plan for

a portion of Summit County was adopted (R pp. 3, 34, 54). The first Master Plan and zone change affecting the subject property occurred in 1977 with the passage of the first zoning ordinance.

3. The Snyderville Basin Development Code (1985), as distinguished from the Development Code of Summit County (1977 as amended 1981) imposed a two class permit system upon the area around Park City and Interstate 80 (R p.54). The Development Code of Summit County (1977 as amended 1981) continues to be applicable to all other parts of the county. The relevant parts of the Development Code, first passed in 1977, are appended to this Brief as Exhibit A. Relevant portions of the subsequent Snyderville Basin Development Code are attached hereto as Exhibit B.

Pursuant to §§12.1, 12.3 and 12.18(g)(h) an Auto Body Shop is a permitted use in a commercial zone under the Development Code of 1977 as amended 1981 (R pp 24, 25, 29) (Exhibit A, p 5). This is the use for which the Plaintiffs sought a building permit from Summit County. The Development Code defines a permitted use as "a use of land for which no conditional use is required" (Exhibit A, p 1 §1-6, ¶49).

4. The Development Code of Summit County (1977 as amended 1981) protected and guaranteed that property uses which had been designated in subdivisions recorded prior to its effective date were vested property rights. §3.11 states (Exhibit A p. 2):

> "3.11 Subdivision approved prior to passage of code.
>
> A subdivision which has received preliminary approval from the Planning Commission prior to the adoption of this Code shall be allowed in any zone, irrespective of zone requirements or lot size, if the requirements for final approval in accordance with Summit County Ordinance No. 65 had been met and the plat approved within 15 months of the adoption of this Code".

5. The subsequently enacted Snyderville Basin Development Code (1985) was effective at the time of the Stuckers' application for a building permit. This code, again, recognized the vested property rights of lots which had been approved prior to its passage. Provisions of this ordinance specifically guarantee that subdivisions, planned unit developments or other properties which were approved for division and sale prior to 1985 were protected and those properties could be utilized in conformance with the previous zoning ordinance or an owner could elect to develop them under the new code. These rights were expressed in the 1985 ordinance in the following sections:

(a) §1.3 Repeal and Continuing Effect (Exhibit B, p. 1-1)

(b) Statement of Intent (Exhibit B, first page after table of contents)

(c) §4.1 Permits Required (Exhibit B, p 4-1)

6. The Stuckers purchased Lot 225 from the prior owner, Mr. Jim Lynn about March 6, 1990 (R p.188). In addition to the code provision cited in paragraph 5 above, the Stuckers, prior to the purchase of this lot, were provided a letter to Mr. Lynn from the Summit County Planning Director dated May 24, 1989, which stated in part:

> "I personally do not support your proposal to convert your ground from commercial (emphasis added) to single family" (R p. 116).

Mr. Lynn and the Stuckers were told the property should be used for "commercial or multi-family" by Summit County (R p.116). It should also be noted that this lot is located at Silver Creek Junction in Summit County. §5.7.3(b) of the 1985 Code states that commercial development is encouraged to be located at Kimball Junction, Silver Creek Junction and Park West Resort (Exhibit B, §5.7.3 at pp 5-17 and 5-18).

7. The Summit County Planning Commission refused to allow the Stuckers request for a building permit under the "old code" as provided for in §1.3

of the Statement of Intent of the 1985 Revisions (R p.58). The Stuckers then requested a Class I permit pursuant to §4.1 of the 1985 Code in that they were a permitted, commercial use "within a subdivision platted and recorded prior to the adoption of this code * * *". That request was denied and they were forced to proceed for a Class II permit.

8. The Plaintiffs were also entitled to a Class II permit under the current code because their project complied with all absolute policies (except "compatibility" under §5.6.3, (which is discussed later) and had a score of "zero or better" on relative policies as required by §5.2 (R p.17, Exhibit B, p. 5-1).

9. On August 28, 1990, the Planning Commission rejected the Stuckers' application because of "compatibility issues" (R p. 126). The requirement that a development be "compatible" is addressed in §5.6.3 et seq. of the Snyderville Basin Development Code (Exhibit B, p. 5-5).

10. Under the Snyderville Basin Development Code (1985) and in order to satisfy "compatibility", any property owner must obtain a "consensus" of approval from their neighbors [(Deposition of Summit County Planning Director, (R pp. 80-86)]. The Summit County Planning Director, however, does not know how the Summit County Planning Commission determines if a consensus is reached (R p.88).

This concept of a consensus is supposed to be arrived at between the developer and the "affected property owners". The affected property owners are those living within 1,000 feet of the project (Deposition of Summit County Planning Director, R p. 89). If a "consensus" is not met an application for development or a building permit is denied. Only one of 24 "affected persons" objected to the Stuckers' project (R p. 58) though several other neighbors appeared before the Planning Commission to object to anything other than residential use (R p. 123).

All of the other property owners purchased their lots encumbered by restrictive covenants which specifically designated the Stuckers' lot as commercial (R p.10).

11. The Snyderville Basin Development Code provides in §4.1(a):

> "Class I development permits shall (emphasis added) be issued by the Planning Staff, unless the Planning Director determines it would be in the best interest of the public that a Class II permit be required through the Commission.

There are no standards or criteria which delineate when a Class I permit would be issued or the matter would be referred to the Commission (R. p. 55). The "standard" use by the Planning Director to determine if a Class I permit is issued or the matter is referred to the Planning Commission is:

> "Is when the issue is not clear cut, simple, and when there is a considerable amount of interest in the project" (R. p.55)

12. Subsequent to the denial of the building permit, the Stuckers exhausted their administrative remedies by appealing the decision to the Summit County Commission within the time provided by law. On or about October 3, 1990, the Summit County Commission upheld the denial and this action was properly commenced in the District Court within 60 days of that denial as specified in §4.9(7) Snyderville Basin Development Code. (Exhibit B, p. 4-5)

X

SUMMARY OF THE ARGUMENT

1. The zoning ordinance (Snyderville Basin Development Code) in effect at the time the Plaintiffs applied for a building permit specifically stated in §1.3 and §4.1 that Plaintiffs had a vested right to the use of their lot in accordance with its zoning classification in effect at the time of the passage of the Development Code in 1985. It is undisputed that the lot was zoned "commercial" from 1964 until 1985.

2. The county should be estopped from denying the Plaintiffs their building permit. The county received dedicated land; the zoning ordinances reserved and protected the commercial use; the county told the lot owner that the lot was commercial, and Plaintiffs relied upon these representations in purchasing the property for a specific project.

3. Approval of a subdivision plat by a County includes the uses allowed on the lots within the subdivision. Refusal to allow the use of the lots as originally approved by the County constitutes an amendment to the subdivision plat and can only be done in conformance with state law and after a finding that no person will be materially injured. No such procedure or amendment was instituted in this case and the actions of the County in denying the building permit and changing the use of the lot was in direct violation of state statutes

4. Under the existing Snyderville Basin Development Code, no building permit may be issued without a "consensus of compatibility" from the neighbors. This is an absolute requirement and the consent of neighbors is an impermissible requirement before a person may be allowed to build or otherwise utilize his property.

5. There is an absolute requirement that a property owner convince a Summit County Planning Department or Planning Commission that a proposed land use is "compatible" under §5.6.3 of the Snyderville Basin Development Code (1985) before a permit may be issued. No person can know what his property can be used for prior to applying for a building permit; there are no standards or criteria to determine compliance; the actions of the Planning Department and Planning Director were arbitrary and capricious; the Defendants appear to utilize the abstract notion of compatibility to violate county and state law and impose their own feelings on property owners within the Snyderville Basin District.

XI

ARGUMENT

I

PLAINTIFFS WERE ENTITLED TO A BUILDING PERMIT AS A MATTER OF LAW SINCE THE USE APPLIED FOR WAS IN STRICT CONFORMANCE WITH THE ZONING ORDINANCE IN EFFECT AT THE TIME OF THEIR APPLICATION

1. The Trial Court gave no explanation as to why he found the applicable Summit County zoning ordinances did not entitle the Plaintiffs to a commercial building permit (R p.288). The following facts are, however, undisputed: the Plaintiffs' lot, lot 225 of Highland Estates Subdivision Plat B, is in a subdivision which was filed in October, 1964 (R p.1); Summit County had no master plan nor zoning ordinance prior to 1977 (R pp.2, 33); the restrictive covenants of Highland Estates designate that this lot was to be used for commercial use (R p.10) and the Summit County master plan, adopted in 1977, designated this and adjoining lots as commercial. At the time of the passage of the new Snyderville Basin Development Code in 1985, Summit County admits that:

> "Prior to the adoption of the Snyderville Basin Development Code in 1985, the parcel in question was zoned for commercial use" (R p.157).

2. On or about May, 1990, Plaintiffs met with the Summit County Planning Director, Mr. Jim Peterson, to apply for a permit to build and operate a small, auto repair shop on lot 225. Mr. Peterson originally prepared the application as a Class I permit for a new commercial use within a subdivision "platted and recorded prior to the adoption of the Snyderville Basin Development Code", pursuant to §4.1(a) (R. p 101, Exhibit B, p. 4-1).

3. Plaintiffs requested approval under the Snyderville Basin Development Code (1977 as amended 1981) because the 1985 zoning ordinance specifically reserved that right for the application. §1.3 of the Snyderville Basin Development Code (1985) states:

> All presently existing County Regulations and Ordinances, except the Development Code of Summit County, to the extent of their inconsistency with this Code are repealed; provided however, any property within the Snyderville Basin Zoning District to which the Summit County Planning Commission has granted County Master Plan approval, may, in its entirety, be developed exclusively under the provisions of (1) the Development Code of Summit County, or (2) this code (the Snyderville Basin Development Code), at the discretion of the developer. "A Statement of Intent" clarifying the "Continuing Effect " provision of this Code is attached). (Exhibit B, p 1-1).

The Statement of Intent found immediately preceding this section states:

> The intent of this section is to allow continued development under the Development Code of Summit County (old code) of any property where development has had been initiated through master plan or zone change approval prior to the effective date of the Snyderville Basin Development Code (new code). Examples of those "grandfathered" properties are currently identified as, but not limited to (emphasis added), the following: (statement lists six projects which do not include Highland Estates and are attached hereto in Exhibit "A"). Developers of properties which are "grandfathered" have an option to either: (1) continue to develop under the provisions of the Old Code, or (2) to develop under the provisions of the New Code. When a project developer elects to proceed under the Old Code he will be permitted to continue development under the provisions of said Code.
>
> * * *
>
> In the event of the sale of all or any or part of the Grandfathered Property by the project developer, the purchaser also has the option to develop such part of the property purchased under the Old Code (emphasis added) or under the New Code. The election by such a purchaser to proceed with development under the Old Code or the New Code for the property purchased will not affect any election made by the seller for the remainder of the Grandfathered property. Likewise, any such election made by the seller with respect to the remainder of the Grandfathered property will not affect the election

by such a purchaser for the purchaser's portion of the Grandfathered property.

Vested property rights may be created and protected by statute. Western Land Equities v. City of Logan, 617 P.2d. 388,395 (Utah, 1980).

4. Stuckers attempted to make this election and there is no dispute that they would have been entitled to a permit under the old code. In response to a question directed to the Summit County Planning Director and assuming that the Stuckers' zone change had been "grandfathered" he stated:

* * *

"But if the assumption is that the zone change were grandfathered, under the old code, they could have gotten a building permit". (R p. 99)

The county, however, refused to follow their own ordinance and denied the Stuckers' request for a permit under the 1981 code.

Mr. and Mrs. Stucker then requested that a Class I building permit be issued by the Planning Department. This request was also refused. §4.1 of the Snyderville Basin Development Code (1985) states:

(a) A Class I development permit shall be required for: (1) all new commercial, industrial or institutional uses within subdivisions platted and recorded prior to the adoption of this code (emphasis added); . . . The purpose of the Class I development permit is to assure effective regulation of uses and structures which have not previously been reviewed for compliance with this Code, but are located either inside or outside of a previously approved subdivision. Class I development permits shall be issued by the Planning Staff, unless the Planning Director determines it would be in the best interest of the public that a Class II permit be required through the Commission.

5. There is no written standard or set of circumstances dictating when the Class I permit would be issued by the staff or referred to the Commission (Deposition of Summit County Planning Director, p. 18, R. p. 74)

6. Mr. and Mrs. Stucker then completed the process for a Class II permit. This was denied. The Summit County Planning Director admitted that if the zone classification of the Stuckers' property was protected by the "Grandfathering provisions" of the Development Code, they should have received a building permit (R p. 77).

7. Under the clear and unequivocal language of the Snyderville Basin Development Code (1985), the Stuckers were entitled to a building permit under the earlier code because their property rights were vested pursuant to the express terms of that code. §1.3 and the Statement of Intent specifically preserves the right to elect to develop under the Old Code, to not only the original developer, but any subsequent purchaser as to all or part of the project. Further, a vested right to utilize the property in a certain manner adheres to the land itself and is not forfeited by a subsequent buyer of the property who takes the property with knowledge of regulations which are inconsistent with the vested rights. Keith v. Saco River Corridor Commission, 486 A.2d. 150 (Me., 1983).

8. Similar circumstances were analyzed in the case of Town of Seabrook v. Tra-Sea Corp., 410 A.2d. 240 (NH, 1979), where a subdivision plat had been recorded in 1972 but the town contended that a subsequently enacted zoning ordinance, in 1974, prevented use of the lots because they lacked the necessary land area. The New Hampshire Supreme Court stated at page 242:

> "Because the lots are protected under the Grandfather clause, Tra-Sea may improve or sell them as a matter of right". Citing Anderson, Battcock v. Town of Rye, 116 NH 167, 355 A. 2d. 418 (1976); American Law of Zoning §9.62 (second ed. 1976); Bears v. Board of Adjustment, 75 NJ 305, 183 A.2d. 130 (1962).
>
> If the lots are exempt, it was unnecessary for Tra-Sea to establish the existence of a vested right to all the lots or to satisfy standards for a variance by showing that the lots would be rendered valueless by the application of the lot size requirements contained in the Seabrook Zoning Ordinance. Graves v. Town of Bloomfield Planning Board, 97 supra, 306, 235 A.2d. 51 (1967). To interpret the

> Grandfather clause as extending only to those showing a vested right or satisfying standards necessary for a variance would render the Grandfather clause meaningless and defeat its purpose specifically exempting non-conforming lots of record in existing subdivisions.

The New Hampshire Court also ruled that construction of terms in a zoning ordinance is a matter of law and that zoning restrictions must be strictly construed so as to not impair incidences of ownership and the unfettered alienability of property.

9. Even if the Grandfathering provisions of the Snyderville Basin Development Code (1985) did not apply to this property, under the rule adopted by this Court in Western Land Equities, Inc., v. City of Logan, 617 P.2d. 388 (Utah, 1980), the Stuckers have a protected right to utilize their lot in conformity with the use assigned at the time the subdivision was approved. When subdivisions are approved the governing body does more than simply allow for the division of property into smaller parcels. It receives title to roads and other utilities and services. The county also imposes other costs and requirements upon the developer. See Exhibit "A", Chapter 13 the Development Standards of Summit County (1977 as amended 1981).

10. The lot in question has been a commercial lot since the inception of this subdivision 22 years ago. Certain county officials are, now, attempting to substitute their judgment for that of their predecessors or for other, unannounced, reasons trying to change this subdivision. The rule adopted by this Court in Western Land Equities, Inc., v. City of Logan, supra, stated at page 396:

> "The above competing interests are best accommodated in our view by adopting the rule that an applicant is entitled to a building permit or subdivision approval (emphasis added) if the proposed development meets the zoning requirements in existence at the time of application and if it proceeds with reasonable diligence, absent a compelling, countervailing public interest * * *."

The County's attempt to alter its position is legally indefensible and void.

II

SUMMIT COUNTY IS ESTOPPED FROM DENYING STUCKERS A BUILDING PERMIT FOR A COMMERCIAL USE

1. Plaintiffs' assertion in their pleadings that the County was estopped from denying them a building permit for a permitted, commercial use was an issue of fact precluding summary judgment. Ut. Rules Civ.P. 56(c).

2. In addressing the application of zoning estoppel in Utah County v. Young, 615 P.2d. 1265 (Utah, 1980) the Supreme Court stated that zoning estoppel should be invoked when an act or omission occurs and the owner relys on this act and makes a substantial change in their position.

3. This lot was approved by Summit County for commercial use in 1964. Subsequently enacted zoning ordinances recognized and preserved that use (Exhibit B, §1.3). The previous Planning Director, Jack Willis, wrote the party from whom the Plaintiffs purchased their lot and told him that the lot was to be used for commercial use and a change to single family residences would not be acceptable to the County (R p.116). The Plaintiffs relied on this letter, as well as the clear language of the zoning ordinances when they decided to purchase the lot. §5.7.3(b) of the Snyderville Basin Development Code (1985) (Exhibit "B") designates this location at Silver Creek Junction as commercial and §4.1(a) reveals that in the worst case scenario, Stuckers were entitled to a Class I development permit for a commercial use "within subdivisions platted and recorded prior to the adoption of this case" (Exhibit B, §4.1).

4. An attempt by North Salt Lake to accomplish a similar result as that being attempted by Summit County was rejected in Wood v. North Salt Lake, 15 Utah 2d. 245, 390 P.2d. 858 (1964), where an enacted zoning ordinance was amended after subdivision approval to force the owners to enlarge the square

footage necessary to build on certain lots. As in this case, no compelling justification was given except the capricious actions of the county officials. In Wood the Court stated at page 860:

> "This ordinance, if sanctioned, easily could dry up the mortgage market for investors in platted subdivisions, could alienate title companies from insuring any lots therein, discourage purchase of lots, and long range subdivision development, impale title lawyers on the horns of a dilemma and lead to a policy of accepting plats, only to sanction their arbitrary rejection, if one chooses not to build on vacant property within the year. All of which this Court cannot deify. Therefore, we reverse with instructions to order the granting of the permit unless it is shown that other than that the only reason for its denial is the existence of the area ordinance, subject to this litigation"

5. There is also the factual issue whether Stuckers have a "contractually vested interest" which was noted by the Court in Western Land Equities, Inc., v. Logan, 617 P.2d. 388 (Utah, 1980). What property the county received at the time of the subdivision plat, including dedicated roads and/or utilities is an issue of fact. When a dedication occurs, the rights to utilize the land in the subdivision in the manner in which the county approves the land division vests such uses in both the developer and any subsequent purchaser. Ward v. City of New Rochelle, 197 NYS 2d. 54 (Sup. Ct., 1959); Mayor and Council of Baltimore, v. Crane, 354 Md. 198, 352 A.2d. 786 (1976).

III

SUMMIT COUNTY'S CHANGE OF USE OF A PLATTED SUBDIVISION CONSTITUTES AN UNLAWFUL AMENDMENT OF THE SUBDIVISION CONTRARY TO §57-5-7.1 UCA (1953 AS AMENDED) AND §57-5-8 UCA (1953 AS AMENDED)

1. When any subdivision is approved by the governing body of the County, the use of the property within the project is part of that approval. It is always the case that a subdivision is approved with open space, roads, areas for commercial or recreational development, dedication for public space and a

myriad of other zoning requirements (Exhibit A &B). When a subdivision is amended, more is accomplished than simply redrawing the lines on a mylar plat. The changes often alter the use or location of various activities; building density or public property which has been designated to exist within the bounds of the subdivision; location of streets, schools, trails, parking or other considerations inherent in the initial approval.

2. In this action, the county approved the Highland Estates subdivision plat "B" with several lots bordering Silver Creek Junction designated for commercial use. They are now attempting to amend that subdivision plat under the guise of exercising their zoning authority without complying with the applicable state statutes. §57-5.7.1 UCA (1953 as amended) states:

> "A proposal by the governing body of a city or town or by a board of county commissioners to vacate, alter or amend a subdivision plat, portion of a subdivision plat, or any street, lot or alley contained in a subdivision plat shall be considered without petition at a public hearing, notice of which shall be given as provided in §57-5.7.5".

3. It is uncontested that Summit County made no attempt to comply with this procedure and, in fact, did not go through any formalities to try and amend the Highland Estates plat "B" subdivision plat. In addition, the County must make a finding of no material injury in order to allow such amendment to proceed. §57-5-8 UCA (1953 as amended):

> "Within 30 days after the public hearing required by §57-5-5.5 through 57-5-7.5, the city or town governing board, or the board of county commissioners shall consider the petition. If it is satisfied that neither the public nor any person will be materially injured by the proposed vacation, alteration or amendment, and that there is good cause for the vacation, alteration or amendment, it shall vacate, alter or amend the plat, any potion of the plat, or any street, lot, or alley in the manner that it considers appropriate".

4. No action or procedure was instituted to amend this plat and the actions of the county to avoid the statutory procedures by surreptitiously saying

that the Plaintiffs needed zoning approval and that the project was not "compatible" was simply a charade to amend the subdivision plat without complying with the foregoing statutes.

IV

THE REQUIREMENT IN THE SNYDERVILLE BASIN DEVELOPMENT CODE (1985) REQUIRING A LAND OWNER TO OBTAIN A "CONSENSUS" OF NEIGHBORS CONSTITUTES AN IMPERMISSIBLE CRITERION FOR THE ISSUANCE OF A BUILDING PERMIT

1. §5.6.3 of the Snyderville Basin Development Code (Exhibit "B") describes, in four pages, a mandatory requirement that anyone must satisfy in order to obtain a building permit in the Snyderville Basin. It is an absolute policy which everyone must meet if they want a Class I or Class II building permit (Deposition Summit County Planning Director, R pp. 78-79). The question then becomes, what is this mysterious function designated "compatibility" and who makes the determination? It is submitted that it is, in fact, the neighbors who make the decision for zoning approval or denial

2. In summary, the compatibility assessment provided for in §5.6.3 of the Snyderville Basin Development Code (1985) progresses down the following path: (Exhibit B, pp 5-5 to 5-8)

1. Neighborhood meetings for the developer to meet with the neighbors. §5.6.3(1)

2. The meetings shall consist of the neighbors, the planning staff and the developer and notice to any neighbor who lives within 1000 feet of the project. §5.6.3(2)

3. The developer is to give a presentation to explain the proposed use and the various details of the project. §5.6.3(3)

4. Topics which should be discussed between the developer and the neighbors (traffic, views, noise, lighting, water

run off, odor nuisance, pollution, privacy or change of character). §5.6.3(4)

5. Relevant solutions in the event any of the topics in paragraph 4 create a problem. The solutions to be discussed are the specific topics of conversation reflected in the preceding sub-paragraph. §5.6.3(5)

6. After the developer and the neighbors have had their exchange, the staff is to prepare a report on whether a "consensus" was reached and what conditions might be imposed. §5.6.3(6)

7. Where the meeting between the developer and the neighbors does not result in a "consensus" the staff prepares a summation about where the developer and the neighbors do not agree and present that summation to the Planning Commission. §5.6.3(7)

8. Where the developer and the neighbors do not reach a "consensus" a public hearing will be held. §5.6.3(8)

9. The public hearing is to include affected property owners within 1000 feet, the developer, the Planning Commission and staff. §5.6.3(9)

10. Topics of the public hearing shall be those addressed in §5.6.3 and subsections 4 and 5. §5.6.3(10)

11. After the public hearing the commission will make a decision from three possible choices: §5.6.3(11)

    (a) the commission agrees with the developer that a permit should be issued; or

    (b) the commission agrees with the neighbors and requires the developer to take action to meet their demands; or

    (c) the commission agrees with the neighbors and believes their concerns cannot be met the project is denied.

3. Besides the inherent ambiguity of determining what is "compatible" or whether a "consensus" is addressed, this provision of the Snyderville Basin Development Code (1985) turns the zoning power over to the neighbors with the Planning Department and Planning Commission acting as referee between two,

adversarial parties. Consent of neighboring land owners may not be made a condition for issuance of a building permit. Thurston v. Cache County, 628 P.2d. 440 (Utah, 1981). This case fits squarely within the situation reviewed in Davis County v. Clearfield City, 756 P.2d. 704 (CA, Utah, 1988) stating that "public clamor" is not an adequate, legal basis to deny a building permit.

4. Stuckers submit that the record unequivocally supports that after the County rejected Plaintiffs' right to develop under the Old Code; rejected their request they had a vested right to the commercial use in existence since 1964; and rejected their request for a permit as a new commercial use in an existing subdivision under §4.1(a) of the Snyderville Basin Development Code (1985, Exhibit "B"), that they would have received a Class II building permit except for the fact that Summit County utilized the clamor of the neighbors to decry this project as "incompatible" and deny it. The legal deficiencies of this situation were set forth in the Plaintiffs' Memorandum in Support of Motion for Summary Judgment and are repeated here.

5. In attempting to ferret out what one must do to satisfy the "consensus of compatibility", the Plaintiffs took the deposition of the director of the Summit County Planning Office, pages of which were attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment, and are found in the record at pages 74 to 100. Mr. Peterson stated:

Q Could you explain to me compatibility assessment?

A Its one of the absolute policies in the Snyderville Basin Code and it's-it looks totally at the compatibility situation and assesses it through public input.

Q Sounds like zoning by neighbor, but is that-

A That's your phrase.

Q You said they assess it through public input. I mean, is it the neighbors who are determining it or is there a separate set of

criteria that is looked at by either yourself or the county officials to assess it?

A I think the first paragraph explains the-not the purpose of assessing it, but how it comes about, and then also listed in that same section are different potential compatibility issues that the staff may want to refer to at the compatibility meeting.

* * *

Q It is ever possible to assess compatibility before submitting a building application? I'm sorry, development permit application?

A No. (emphasis added)

* * *

Q Looking at Exhibit 4, Mr. Peterson, on the first page "General Information Summary" under "recommendation/findings" there is a reference here, and let me show it to you, that a consensus was not met. My question is, what does that mean?

A At the compatibility meeting that was held and conducted by the staff, the meeting did not adjourn with everybody there being either for or against it.

Q So the numbers of people participating determine-

A No. It's that issue was not resolved.

Q So if there is one versus fifty, a consensus is not reached?

A Oh, I- it's too general. I couldn't comment on that.

Q Well, is it fifteen, ten, or is there any number?

A Your creating a circumstance that you kind of have to be there to believe it. Your just creating a circumstance that I can't respond to.

Q Well, explain to me the guidelines or anything that you use in determining or defining when a consensus has met or not met. How do you do it?

A When those that are at the meeting either are clearly on one side or the other.

* * *

Q Are you going to tell me that the more people I bring, the better off I'm going to be getting a consensus, or that it doesn't

matter, or that I'm just going to play it like I feel it, or any of the above?

A No. There has to be a clear consensus that everybody there at the meeting hasn't reached an agreement one way or the other.

* * *

Q Do you have any idea how the Planning Commission determines whether there is a consensus or not?

A No. (Emphasis added)

6. As explained by Mr. Peterson, in order to comply with the absolute policy of compatibility, anyone requesting a building permit must obtain a consensus of approval from neighboring property owners. Presumably, that means neighbors living within 1000 feet as defined by §5.6.3 (1)(2) Snyderville Basin Development Code (1985). In the case of the Stuckers, the meeting to assess a "consensus of compatibility" was held before the Summit County Planning Commission, August 28, 1990. The minutes demonstrate nine people appeared to object. (R p.122). Only one of those people was listed as an "affected owner" living within 1000 feet (Mr. Butts) (R p.129).

This provision is not designed to provide legitimate input from neighbors regarding a project which may affect their community. §5.6.3 of the Snyderville Basin Development Code sets up an adversarial process between a developer and the neighbors with the Planning Department and Planning Commission acting as judges. If differences are not resolved the permit is denied. This gives neighbors impermissible veto power over the issuance of any building permit in the Snyderville Basin. Contracts Funding v. Mayne, 527 P.2d. 1073 (Utah, 1974); Davis County v. Clearfield City, 754 P.2d. 704 (C.A. Utah, 1988).

V

PLAINTIFFS' PERMIT WAS DENIED IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY FASHION

1. Plaintiffs do not contend that the entire Snyderville Basin Code is invalid or perpetuates the discriminatory application which they suffered at the hands of Summit County. Plaintiffs do, however, contend that §5.6.3 of the Snyderville Basin Development Code (1985) and its subsections abdicates veto power to the neighbors and is so vague as to be unenforceable. It is, also, arbitrarily applied to reject projects for personal or illegitimate reasons. While performance or point zoning has been upheld by this Court [Thurston v. Cache County, 626 P.2d. 440 (Utah, 1981)] this amorphous, compatibility requirement was not part of that review.

2. It should be emphasized that the Snyderville Basin Development Code (1985) addresses improvements and facilities which a person would have to have to build on his lot in other sections: §5.6.1 lists environmental criteria including air and water quality, sewage disposal, slopes and avalanche problems. §5.6.2 addressed geologic hazards and avalanches. §5.6.4 address utilities, sewers, waste disposal, fire protection, roads, water systems and ingress and egress. It also addresses curb and gutter, parking, trail system utility corridors and parking areas. §5.6.5 addresses frontage, building height, screening and signs. §5.7.1 speaks of water quality, erosion, soil and wildlife. §5.7.2 restricts building within flood plains, critical slopes or visually sensitive areas. §5.7.3 governs where commercial activities should occur. §5.7.4 provides design criteria. §5.7.5 traffic and access, etc. Other provisions provide for density and multi-family situations. "Compatibility" is a separate demon.

3. All of the items which are to be considered in determining compatibility under §5.6.3(4) (Exhibit "B", page 5.6) are either required as absolute

policy or addressed elsewhere in the code. That is, any person requesting a building permit must satisfy the county that the requirements for these services or restrictions have been met prior to obtaining a permit exclusive of his building plans being "compatible"?

4. The reason the Stuckers did not receive a Class I building permit was because the county Planning Director determined that their proposal had not met the compatibility requirements (R p.76). The Planning Director simply decided that compatibility had not been met but made no determination as to which issues of compatibility were not met (R p. 77).

5. It should also be noted that the Stuckers did not receive a Class I building permit because the Planning Director and the Planning Staff were operating under a misapprehension of the law. It was the Planning Director's opinion that there was no master plan in effect between 1982 and 1985. Mr. Peterson testified at page 67 of his deposition (R p. 93) that the master plan map passed in conjunction with the Development Code of Summit County "was effectively nullified in 1982". Mr. Peterson stated at page 67 (R p. 93):

> "Because this (master plan) was effectively nullified in '82, and then in '85, a brand new code was implemented in that section of the County".

When asked why he believed there was no master plan he mistakenly opined that the Planning Commission did not have a review and sign the master plan and it was nullified (R p.94) because:

> "They had a provision that they had to annually review it and sign it, approve it, and they did so annually from '79, but in '82, was the last year they reviewed it and signed it and kept it official".

This conclusion by Mr. Peterson is absolutely false and unsupported by any ordinance. He simply conjured up a non-existent requirement and then concluded there was no master plan prior to 1985 and, therefore, there was no

zone to which the grandfathering provision of the Snyderville Basin Development Code (1985) would refer. He made no attempt to verify this conclusion, which is false, and forced the Stuckers to proceed through an expensive and time consuming process because there were certain members of the staff who were arbitrarily out to deny this permit application.

6. According to Mr. Peterson, it is never possible to assess compatibility prior to submitting a building application (R p.82). The Summit County Planning Director or Planning Staff defines compatibility (R p.84) "when those that are at the meeting either are clearly on one side or the other". He then went on to say that even if a majority of people who appeared were in favor of a project it might not be compatible because there would be 49% in opposition (R p.85). Mr. Peterson also stated that he had no idea how the Planning Commission determined whether there was a consensus of compatibility or if Stuckers had any idea how the Planning Commission came to this conclusion. It is submitted to this Court that a review of the portions of Mr. Peterson's deposition found in the record at pages 74 to 100 demonstrate the slight of hand maneuvering that the respondents utilized under the guise of §5.6.3 to effectuate their own result without regard to the people whom they serve.

7. The minutes of the Planning Commission meeting on August 28, 1990, wherein the Stuckers request for a Class II building permit was finally denied, are found in the record at pages 123 to 126. The minutes reflect the following opinions of the Planning Commission:

> 1. "Commissioner Crandall said the lot in question can be used for commercial because he feels the lot is within the Silver Creek Commercial node, the CC&R's indicate it is commercial property, and the letter from the previous Planning Director also says it is commercial.

2. Commissioner Shafkind reads §5.6.3(ii). He said he does not hear a consensus of compatibility from the neighbors and does not feel that compatibility issues can be resolved.

3. Commissioner Glasmann said the road is an issue of incompatibility.

4. County Commissioner Soter moved to deny the project because of compatibility issues".

8. §5.6.3(ii)(b)(c) Snyderville Basin Development Code (1985) (Exhibit B) states that when the commission agrees with the neighbors' complaints they should require measures to bring the project into a compatible state and state their reasons. If the project cannot be made acceptable to the neighbors, they should state their reasons why. One member of the Planning Commission voted to approve the project. One member said that the road was an issue of compatibility but, in fact, access and roads are addressed as separate requirements in §5.6.4 and 5.7.5 Snyderville Basin Development Code (1985). The other commissioners just said it was "incompatible" and no reasons were given.

9. The application of this particular section is a charade which allows neighbors and/or the Planning Department of the county to impede or nullify anyone's property rights by simply saying it is incompatible. In Western Land Equities, Inc., v. City of Logan, 617 P.2d. 388 (Utah, 1980)

* * *

"It is incumbent upon a city, however, to act in good faith and not to reject an application because the application itself triggers zoning reconsiderations that result in a substitution of the judgment of current city officials for that of their predecessors".

See also Wood v. North Salt Lake, 15 Utah 2d. 245, 390 P.2d. 858 (1964); Thurston v. Cache County, 656 P.2d. 440 (Utah, 1981); Davis County v. Clearfield City, 756 P.2d. 704 (C.A. Utah, 1988); Town of Seabrook v. Tra-Sea Corp, 410 A.2d. 240 (NH, 1979).

10. The Plaintiffs were the victims of this arbitrary and capricious action on behalf of Summit County and the incoherent provision in the Snyderville Basin

Development Code (1985) allowing county officials to deny someone a permit to utilize their property because it is "incompatible". This denies land owners the right to have any reasonable expectation of what their property may be used for before submitting application for a specific permit and allows arbitrary denial of land use for any reason, including personal motivation on the part of the individual members.

XII

CONCLUSION

Plaintiffs request this Court for the following relief:

1. Enter an Order Directing Summit County to issue a building permit to the Plaintiffs in conformance with the existing Summit County Development Code (1985).

2. Enter an Order that Summit County is estopped or otherwise prevented from denying the Stuckers a building permit.

3. Enter an Order that §5.6.3 of the Snyderville Basin Development Code (1985) is void and that Summit County has acted arbitrarily and capriciously in the application of this section and order that the Plaintiffs receive their building permit.

4. Remand this case for the Trial Court to decide the disputed issues of fact and enter appropriate findings and conclusions thereon.

DATED this 22 day of July, 1992.

Robert Felton

In the Utah Court of Appeals

STEVE STUCKER and MICHELLE STUCKER, Plaintiffs/Appellants, vs. SUMMIT COUNTY (RESPONDENT), HIGHLAND ESTATES HOMEOWNER'S ASSOCIATION, KATHY MEARS, DAVE RICH, ELWAYNE DALY, and SUE SMITH, Defendants.	Case No. 920263-CA Priority 16 **CERTIFICATE OF SERVICE**

I hereby certify that I delivered by hand, four true and correct copies of the BRIEF OF APPELLANTS in the above entitled case to Jody K. Burnett, Attorney for Respondent Summit County, 257 East 200 South, Suite 500, Salt Lake City, Utah 84145, on the 22 day of July, 1992.

Robert Felton